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JAMES H. MCKENNEY,
Clerk.

No. 238.

Sup. of Atty. Gen. (Maynard Pratt)
for Appellant.

Filed Apr. 3, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE DISTRICT OF COLUMBIA
v.
STEPHEN TALTY. } No. 238.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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OCTOBER TERM, 1900.

THE DISTRICT OF COLUMBIA
v.
STEPHEN TALTY. } No. 238.

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BRIEF FOR APPELLANT.

STATEMENT.

Under the act of Congress, "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved June 16, 1880 (ch. 243, 21 Stat. L., 284), Stephen Talty, the appellee, filed his petition, on the 15th day of December, 1880.

On the 11th day of February, 1882, the defendant filed a traverse to the petition.

The case was referred, and, after a report, re-referred to Dan Donovan, a referee. Although some proceedings were had at different times, there was neither trial nor judgment; when, on the 22d day of June, 1897, on motion of claimant, defendant consenting, it was ordered "that the case of *Stephen Talty* v. *District of Columbia*, No. 335, be referred to Frank W. Hackett,

esq., as referee, under the act of Congress approved June 16, 1880, to take and state the account between the claimant and defendant." (Record, p. 3.)

After and pending this reference, on the 28th day of July, 1897, the claimant filed what he styled an amended petition. The reason for this is found in the immediately preceding entry (Rec., p. 1): "The original petition was taken from the files of the court by the referee and, by reason of his death, has never been returned, and can not now be found."

At no time, before the filing of the "amended petition" nor since, was any offer or attempt made to supply the original petition in the case or to prove its contents. There never has been any pretense that the *amended petition* was a substitute for the original petition.

Under the reference of June 22, 1897, a report was made on October 19, 1897, which was excepted to by the defendant, on the ground that no account was stated therein, and a motion for re-reference was made and allowed on March 1, 1898. (Record, p. 3.)

The referee filed his second report on the 23d day of April, 1898. (Record, p. 4–11.)

In that report the referee states:

> This additional report intends that the referee shall state an account, together with the evidence taken by the referee, for the information of the court.
>
> * * * * *
>
> It was agreed at the hearing that the papers heretofore filed in this case have disappeared.

Search in the office of the attorney for the District, and at the house of Mr. Donovan, former referee, has failed to discover anything of these papers. It is not charged that their disappearance is due to any fault of the claimant.

* * * * *

Repeating to some extent what has already been stated in the report, it may be said that the reports in this cause are for work done and materials furnished under a written contract, numbered 826, dated August 7, 1873, entered into between the board of public works of the District of Columbia and Stephen Talty. Two extensions of this contract were entered into between the Commissioners of the District, successors to said board, and the said Talty, which extensions are dated, respectively, September 17, 1875, and December 3, 1875.

In stating the account between the claimant and the District the referee relies upon items of charge and receipt set forth in the papers already referred to, filed in this cause by the District in response to the call for the same by the claimant.

The account of contract numbered 826 is stated in the report as follows:

The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on M street NE.

Lowering water main		$1,100.00
Surface work		48,223.54
		49,323.54
Credit by certificates	$44,345.51	
Credit by property	4,688.40	
		49,033.91
Balance due January 15, 1876		289.63

The account of work done under the two extensions of contract No. 826 is stated as follows:

The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on K street NE., from Third to Seventh.

[File No. 1, filed July 2, 1897, Doc. 335, and Lieutenant Hoxie's report.]

2,591 cubic yards ordinary excavation, at 30 cents per cubic yard	$777.30
2,092 cubic yards 2 feet of old graveled streets, at 40 cents per cubic yard	836.80
3,662 cubic yards earth hauled 350 feet over 200 feet, at 1¼ cents each 100 feet over 200 feet	160.03
2,824 linear feet 12-inch gutter flag, at 35 cents per foot	938.43
993.31 linear feet 16-inch gutter flag, at 48 cents per foot	417.39
3,255.61 linear feet bluestone curbing, 5-inch, at $1.20	3,906.72
56.4 linear feet granite circular curbing, at $2.05	115.62
25.3 linear feet bluestone circular curbing, at $2.05	51.86
3,938.12 square yards sidewalk, at $1 per yard	3,938.12
7,522.9 square yards graveled street, at 15 cents per yard	1,128.43
1,591 square yards cobblestone, at 70 cents per yard	1,113.70
	13,434.40

Credit by certificates:		
No. 19,360, December 6, 1875	$910.00	
No. 15,576, January 14, 1876	5,282.04	
Property, sand and gravel	359.50	
Property charged, not specified	2,992.05	
		9,543.59
Balance due March 18, 1876		3,890.81

This latter statement the referee reports is made from "memoranda in the sheets just referred to;" these sheets being "original sheets of measurements taken

from the field book of the engineer measuring the work. It indicates the measurements and quantity of material in tabulated form." * * *

> Paper No. 2 (in red ink), filed July 2, 1897, being a copy from the account of Stephen Talty with the District, contains an item of property charged against the contractor amounting to $2,992.05. This is written in lead pencil, it appearing that the same figures are written in lead pencil in the original book in the possession of the District. As this is a charge made by the District against the claimant for property furnished him in the performance of the contract, the referee charges the same against the amount that appears due to the claimant.

The supplemental report made by the referee was, by some inadvertence, not included in this transcript, but as the matter of the same appears hereafter in the record (p. 19, VI), this may be considered immaterial.

To this report of the referee on October 17, 1898, the defendant filed the following exceptions (R., p. 11):

> I. The referee erred in treating the paper "filed July 2, 1897, marked No. 1 in red ink," as a final measurement of the work referred to in said paper.
>
> II. The referee erred in stating the account between the claimant and the District of Columbia as being contained in the above-mentioned paper, the same not even purporting to be the account between the parties.
>
> III. The referee erred in stating the account between the parties, there being no competent testimony to support the same.

IV. The referee erred in stating the account according to the entries from the ledger of the District of Columbia, the entries upon said ledger showing affirmatively that the account was not stated.

V. The referee erred in rejecting the evidence of the statements of the accounts by the former referee, those statements being the best evidence obtainable of the condition of the accounts between the claimant and the District. This, in view of the admitted fact that the original petition and report of the referee, Donovan, and testimony shown by the docket entries to have been introduced, have been lost.

These exceptions were merely overruled, as follows: "Overruled by the court. Charles C. Nott, chief justice."

On the 20th day of February, 1899, it was ordered by the court that the two reports of the referee above mentioned stand and be confirmed; and it was further ordered that the said reports stand as the findings of fact of the court in this case (R., p. 3).

Judgment was thereupon entered for the sum of $4,180.44 against the defendant upon debts of the District of Columbia due and payable on the 18th day of March, 1876 (R., pp. 3, 15).

On the 15th day of March, 1899, the defendant filed its motion for a new trial as follows (Rec., pp. 12–16):

Now comes the defendant, The District of Columbia, and moves the court to vacate the judgment heretofore rendered in this case on February 20, 1899, and to grant a new trial

herein, and for reasons therefor assigns the following:

I. The reports of the referee, dated October 19, 1897, and April 23, 1898, adopted by the court as its findings of fact, do not refer to and return to the court all the testimony presented to said referee, in this: That said reports do not include the memorandum report and letter of Daniel Donovan, returned by the Commissioners of the District of Columbia on April 19, 1898, in answer to a rule of the Court of Claims of April 8, 1898, which paper is included in a supplemental report of the referee dated October 12, 1898.

II. The court, in adopting the reports of the referee as its findings of fact, failed to pass upon the exceptions entered by the defendant, District of Columbia.

III. The court erred in adopting as a finding of fact the account stated by the referee in his report dated April 23, 1898, the said account being for "board rates," instead of the rates provided for and properly under the contract No. 826.

IV. That the court erred in adopting as a finding of fact the report of the referee that the claimant was entitled to recover, under the extensions of contract No. 826, the "rates" established by the board of public works after the date of said contract No. 826, or any increased rates over those stated in or allowable under said contract No. 826.

V. That the court erred in separating the account for work done under the *extensions* of contract No. 826 and the work done under the *original*

contract No. 826, because, to make a fair and proper settlement, all the work done under the original contract and its extensions should have been made the subject of the account.

VI. That the court erred in this: the original petition having been lost and no substitution therefor having been made, nor any evidence offered or introduced as to its contents, the amended petition filed could not be considered by the court, and no valid judgment could be given thereon.

VII. The reports of the referee, adopted by the court as its findings of fact, are contrary to the evidence. The following evidence was introduced by the defendant:

"DEPARTMENT OF JUSTICE,
"*Washington, D. C., November 11, 1890.*
"Mr. DANIEL DONOVAN,
"*Washington, D. C.*

"SIR: You are hereby employed to assist the counsel of the United States in the investigation of the claims set forth in the suit of *M. J. Loughlin* v. *The District of Columbia*, and certain other suits of that class pending in the Court of Claims, and in obtaining evidence for the defense thereof.

"Your compensation will be at the rate of $10 per day for each full day's service, payable from the appropriation for 'Defending suits against the District of Columbia.'

"Very respectfully,
(Signed) "W. H. H. MILLER,
"*Attorney-General.*"

(This paper was not before the referee.)

And to a call of the Court of Claims the Commissioners made the following response:

"OFFICE OF THE COMMISSIONERS,
"DISTRICT OF COLUMBIA,
"*Washington, April 19, 1898.*

"STEPHEN TALTY
v.
"DISTRICT OF COLUMBIA. } No. 335.

"To JOHN RANDOLPH, Esq.,
"*Assistant Clerk Court of Claims of United States.*

"SIR: For answer to the rule issued in the above-entitled cause, transmitted with your letter of April 8, the Commissioners of the District of Columbia return herewith the following certificates, measurements, or other evidences of indebtedness, to wit:

"Copy of a memorandum report made by the referee, Daniel Donovan, in the above cause. Voucher No. 19360 of 1875.

"Very respectfully,
(Signed) "WILLIAM TINDALL,
"*Secretary.*"

"WASHINGTON, D. C., *June 25, 1891.*
"FELIX BRANNIGAN, Esq.,
"*Assistant Attorney, Department of Justice.*

"SIR: In compliance with your request and verbal instructions, and under my appointment by the Attorney-General of the United States of November 11, 1890, I have made a careful, thorough, and searching investigation of all records, vouchers, and other papers pertaining to every of the cases relating to the District of Columbia now pending in the United States

Court of Claims under the act of June 16, 1880, and beg to submit the following report as the result of such research:

* * * * *

"STEPHEN TALTY
v.
"THE DISTRICT OF COLUMBIA. } No. 335. Referred list (p. 36).

"This case involved the examination and stating of accounts under seven separate and distinct contracts. It was referred to me as referee by the Court of Claims, and was reported under a rule of said court, heretofore referred to in Murray's case, No. 90.

"Said report shows that claimant is entitled to recover from the defendant under his several contracts the sum of	$1,814.79
"It further shows that claimant is indebted to defendant, by reason of overpayment by the board of audit, in the amount of	989.71
"Thus leaving a net balance due claimant	825.08

Attached to said report and forming part thereof is the following set-off:

"File No. 22. 61.5 square yards of cobble-stone pavement relaid, allowed at 37 cents per yard in lieu of 30 cents, the contract rate. Excess, 7 cents per yard on 61.5 yards	4.30
"8,237.98 cubic yards grading, allowed at 40 cents per yard in lieu of 30 cents, the contract rate. Excess, 10 cents per yard on 8,237.98 yards	823.79
"784.20 cubic yards rock excavation, allowed at $1 per yard in lieu of 30 cents per yard, the contract rate. Excess, 70 cents per yard on 784.20 yards	548.94
"Total	1,377.03

"A more thorough and exhaustive examination of the records which constitute my former report in this case convince me that the counter-claim therein reported is both erroneous and unjust, for the reason that M street northwest, wherein the alleged excessive allowances were made claimant, was in fact, at the time he did the work, an old graveled street, and also that rock was encountered in part of it. It also appears that nearly the whole of the work was done under the Commissioners of the District of Columbia, and that the prices certified by the engineer and paid Talty were what are commonly known as 'board rates,' and that said allowances were not made under any mistake of fact, but that they were the prices universally paid to other contractors doing similar work at the time.

"I am therefore of the opinion that my former report should be amended by striking out the set-off therein stated, and finding a balance due Talty of $825.08, with interest from March 1, 1876. All of which is respectfully submitted.

(Signed) "DAN. DONOVAN.

"Correct copy.

"A. MCKENZIE,

"*Acting Auditor, District of Columbia.*"

And said evidence was not considered by the referee in making his account, adopted by the court as the findings of fact.

VIII. That since the reports of the referee Hackett, and the exceptions thereto, the following paper has been discovered in the files of another case, and the defendant deems it material to the settlement of the issues between the

claimant and the District of Columbia, and therefore prays he may have leave to introduce the same as newly discovered evidence; for, taken in connection with the docket entries in the case (a copy of which is hereto annexed) and the memorandum report of the referee D. Donovan, it is apparent the amended petition is not authorized as a substitute for the original petition.

"Received the original vouchers in the above-entitled causes this April 26, 1881. Eleven vouchers in Roche cause, and reply of Commissioners, and three vouchers in No. 82, and twenty-three vouchers in No. 335. Stephen Talty.

I. S. LYON,
For Department of Justice."

(Written across the face:) Returned May 4, 1881. J. R.

IX. And defendant asks leave to have a rehearing upon the said cause, and for permission to file his requests for findings of fact on this date presented to the court.

On the same day the defendant filed its request for findings of fact, as follows (R., pp. 16–20):

I. The claimant had written contracts with the District of Columbia for the improvement of the streets of Washington under the act of February 21, 1871.

II. The claimant brought suit under the act of June 16, 1880, to recover balances alleged to be due upon seven of these contracts, namely, Nos. 140, 199, 242, 283, 903, 966, 826, and two extensions of contract No. 826 made by claim-

ant with the Commissioners of the District of Columbia.

III. That by order of the court, on November 6, 1882, the case was referred to Daniel Donovan to state an account; that said case was again referred to said Donovan on March 31, 1886; that all the papers on file up to that time, including the original petition, contracts (excepting contract No. 826 and the two extensions thereof), vouchers, report of referee, have been lost.

IV. That Donovan died without having made a report under the second reference, and on June 22, 1897, the case was referred to F. W. Hackett, esq., to state an account; that pending that reference, on July 28, 1897, by leave of the court, the amended petition herein was filed; that afterwards, viz, on December 19, 1897, and April 23, 1898, and October 12, 1898, reports were filed by the referee, Hackett; that these reports included accounts upon only the contract No. 826 and its two extensions.

V. That contract No. 826 and its two extensions are as follows:

(Here follow in the motion these contracts.)

VI. The referee, Donovan, reported to the court on May, 19, 1885, that:

Claimant is entitled to recover from the defendant, under his several contracts, the sum of	$1,814.79
That claimant is indebted to the defendant by reason of overpayment by the board of audit	989.71
Thus leaving a net balance due claimant of	825.08

On page 2 of said report, and forming part thereof, is the following set-off:

File No. 22. 61.5 square yards cobblestone pavement relaid, allowed at 37 cents per yard, in lieu of 30 cents, or contract rate. Excess, 7 cents per yard on 61.5 yards ..	$4.30
8,237.98 cubic yards grading, allowed at 40 cents per yard, in lieu of 30 cents, contract rate. Excess, 10 cents per yard on 8,237.98 yards	823.79
784.20 cubic yards rock excavation, allowed at $1 per yard, in lieu of 30 cents per yard, the contract rate. Excess, 70 cents per yard on 784.20 yards	548.94
Total	1,377.03

That this excess of payments was made for work done under contract No. 826, and was made by allowing for work at "board rates" instead of contract rates.

VII. That the greater parts of the settlements made under contract No. 826 and all the settlements under the extensions of said contract were made at "board rates" and not at the rates fixed under contract No. 826.

VIII. That upon the whole excess the claimant is indebted to the District of Columbia in the sum of $551.95.

On the 25th of January, 1900, the defendant filed the following motion (R., p. 20):

Now comes the defendant by the Attorney-General and moves the court to reform judgments rendered in this case on the 20th day of February, 1899, and made final by the judgment overruling the defendant's motion for a new trial on the 8th day of January, 1900, by showing that the cause came on to be heard on the reports of the referee and exceptions to the

report of the referee filed April 23, 1898, and that the exceptions to said report were overruled.

The record shows that the exceptions were overruled at the time of the overruling of the motion for a new trial, which counsel deems an error and which he assigned for error in the motion for a new trial. And defendant further asks the court for a finding upon each of the requests for finding of fact filed March 15, 1899, the record not disclosing any action of the court thereon.

On the 26th day of February, 1900, the court made the following order:

> The motion of the defendant for a new trial is hereby overruled and the old finding set aside and new findings this day filed, and the request of defendant for findings disallowed.
>
> BY THE COURT.

The findings of fact above noted are as follows (R., p. 20):

> I. The claimant and defendant entered into the following contract, viz: [Contract No. 826 and its two extensions are then set out in this finding *in extenso.*]
>
> The account under contract No. 826 stated at contract price is as follows:

The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on M street NE.

Lowering water main		$1,100.00
Surface work		48,223.54
Total		49,323.54
Credit by certificates	$44,345.51	
Credit by property	4,688.40	
		49,033.91
Balance due January 15, 1876		289.63

II. Account under extensions of contract for work done at prices established and paid by the board of public works is as follows:

The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on K street NE., from Third to Seventh.

2,591 cubic yards ordinary excavation, at 30 cents per cubic yard	$777.30
2,092 cubic yards 2 feet of old graveled streets, at 40 cents per cubic yard	836.80
3,662 cubic yards earth hauled 350 feet over 200 feet, at 1¼ cents each 100 feet over 200 feet	160.03
2,824 linear feet 12-inch gutter flag, at 35 cents per foot	938.43
993.31 linear feet 16-inch gutter flag, at 48 cents per foot	417.39
3,255.61 linear feet bluestone curbing, 5-inch, at $1.20	3,906.72
56.4 lineal feet granite circular curbing, at $2.05	115.62
25.3 lineal feet bluestone circular curbing, at $2.05	51.86
3,938.12 square yards sidewalk, at $1 per yard	3,938.12
7,522.9 square yards graveled street, at 15 cents per yard	1,128.43
1,591 square yards cobblestone, at 70 cents per yard	1,113.70
	13,434.40

Credit by certificates:		
No. 19360, December 6, 1875	$910.00	
No. 19576, January 14, 1876	5,282.04	
Property, sand, and gravel	359.50	
Property charged, not specified	2,992.05	
		9,543.59
Balance due March 18, 1876		3,890.81

III. It does not appear that the defendant objected to the quality of the work, either at the time of its completion or at any time thereafter.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides that the claimant is entitled to recover a judgment against the defendant for the sum of four thousand one hundred and eighty dollars and forty-four cents ($4,180.44).

JUDGMENT.

At the Court of Claims, held in the city of Washington on the 26th day of February, 1900, judgment was entered as follows (R., p. 24):

> The court, on due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Stephen Talty, have and recover, in the manner provided by the act of June 16, 1880, chapter 243, the sum of four thousand one hundred and eighty dollars and forty-four cents ($4,180.44) against the defendant upon debts of the District of Columbia, due and payable on the 18th day of March, 1876.

The order of the court overruling the motion of the defendant for a new trial, disallowing the request of defendant for findings, filing findings of the court, and entering the judgment were all upon the same day, the 26th of February, 1900 (R., p. 20).

Immediately thereafter, on March 1, 1900, the defendant filed the following exceptions to the refusal of

the court to make findings of fact as prayed by it (Rec., p. 24):

Exceptions of defendant to refusal of court to make findings of fact.—Filed March 1, 1900.

Now comes defendant, The District of Columbia, by the Attorney-General of the United States, and presents the following exceptions to the refusal of the court to make findings of fact as prayed by defendant in requests filed on January 25, 1900:

1. The defendant excepts to the refusal of the court to find as requested in its second request as follows:

"II. The claimant brought suit under the act of June 16, 1880, to recover balances alleged to be due upon seven of these contracts, namely, Nos. 140, 199, 242, 283, 903, 966, 826, and two extensions of contract No. 826, made by claimant with the Commissioners of the District of Columbia. (Docket entries hereto attached; and memorandum report of Dan Donovan, referee, returned by Commissioners under date of April 19, 1898, attached to the supplemental report of referee.)"

2. The defendant excepts to the refusal of the court to find as requested in the third request as follows:

"III. That by order of the court, on November 6, 1882, the case was referred to Daniel Donovan to state an account; that said referee made a report on May 19, 1885; that said case was again referred to said Donovan on March 31, 1886; that all papers on file up to that time,

including the original petition, contracts (excepting contract No. 826 and the two extensions thereof), vouchers, report of referee, have been lost. (Docket entries and report of Hackett, referee)."

3. The defendant excepts to the refusal of the court to find as requested in the fourth request as follows:

"IV. That Donovan died without making a report under the second reference, and on June 22, 1897, the case was referred to F. W. Hackett, esq., to state an account; that pending that reference, on July 28, 1897, by leave of the court, the amended petition herein was filed; that afterwards, viz, on October 19, 1897, and April 23, 1898, and October 12, 1898, reports were filed by the referee, Hackett; that these reports included accounts upon only the contract No. 826 and its two extensions. (Docket entries, amended petition, and reports of referees)."

4. The defendant excepts to the refusal of the court to find as requested in the sixth request, as follows:

"VI. The referee, Donovan, reported to the court, on May 19, 1885, that—

Claimant is entitled to recover from the defendant, under his several contracts, the sum of	$81,814.79
That claimant is indebted to defendant, by reason of overpayment by the board of audit	989.71
Thus leaving a net balance due claimant of	825.08

"Attached to said report and forming a part thereof is the following set-off:

File No. 22, 61.5 square yards cobblestone pavement relaid, allowed at 37 cents per yard in lieu of 30 cents, contract rate. Excess, 7 cents per yard on 61.5 yards	$4.30
8,237.98 cubic yards grading, allowed at 40 cents per yard in lieu of 30 cents, contract rate. Excess, 10 cents per yard, on 8,237.98 yards	823.79
784.20 cubic yards rock excavation, allowed at $1 per yard in lieu of 30 cents per yard, the contract rate. Excess, 70 cents per yard, on 784.20 yards	548.94
Total	1,377.03

That this excess of payments was made for work done under contract No. 826, and was made by allowing for work at "board rates" instead of contract rates.

(Memorandum report of Dan Donovan, referee, returned by Commissioners, under date of April 19, 1898, and attached to supplemental report of Referee Hackett.)

5. The defendant excepts to the refusal of the court to find as requested in the seventh request, as follows:

"VII. That the greater part of the settlements made under contract No. 826, and all the settlements under the extensions of said contract, were made at 'board rates' and not at the rates fixed in contract 826. (Referee Hackett's report; memorandum report of Donovan above referred to; contract No. 27, and account thereunder in Referee Hackett's 'additional report;' Hoxie's report, Commissioners, D. C., report H. R."

L. A. PRADT,
Assistant Attorney-General.

On the same day the court made the following ruling upon the foregoing requests of defendant (Rec., p. 26):

> Finding VII, above set forth, is refused, except as more fully set forth in the findings of the court, I and II.
>
> Findings II, III, IV, and VI, above set forth, are refused on the ground that the same refer to matters of record in the case and not to facts established by evidence.

Whereupon, on the same day the defendant prayed for the allowance of an appeal to the Supreme Court of the United States from the said judgment, which appeal was allowed.

ASSIGNMENT OF ERRORS.

I. The court erred in trying this case upon the "amended petition" and reports of the referee.

II. The court erred in treating the "amended petition" as a substitute for the original petition, no effort having been made to supply the original petition or prove the contents thereof.

III. The court erred in confirming the reports of the referee herein.

IV. The court erred in overruling the first, second, third, and fourth exceptions to the reports of the referee. (Rec., pp. 11, 12.)

V. The court erred in overruling the fifth exception to the reports of the referee.

V. The court erred in overruling defendant's motion for a new trial.

VI. The court erred in making the order upon the request of findings of fact by the defendant, "request

of defendant for findings disallowed" (R., p. 20), defendant insisting it was entitled to a specific affirmance or denial of each request. (Exceptions were taken at the time by defendant.) (R., p. 24.)

VII. The court erred in refusing to receive the evidence offered by the defendant as set out in the request for findings of fact.

VIII. The court erred in confining its findings to Contract No. 826 and extensions.

IX. The court erred in rendering judgment for the claimant.

ARGUMENT.

I.

The errors insisted upon by the defendant, The District of Columbia, all arise from, and may be said to be included in, the failure to try the case originally brought, and the impossibility, on account of the loss and destruction of all the records in the case, to state an account between the claimant and the District.

After the case had been referred to Mr. Hackett, the referee appointed in 1897, it was discovered that not a paper was on file in the court; nor could any one be found after diligent search. There can be no hesitation as to the proper and necessary course to be pursued by the claimant. He should have endeavored to substitute a petition for the one lost. He did not offer to do so. The defendant protested in every way against stating any account, unless it was done under the original petition. The petition in suits in the Court of Claims is the declaration and the commence-

ment of the suit. If lost, after discovery of that fact no trial can be had until it is supplied. No amendment to it can be made until, at least, its contents are shown.

Mr. Justice Story, in *United States* v. *Kirkpatrick* (9 Wheat., 720, 729), speaking of elementary principles in this regard, says:

> In this case, the court can not but lament the extreme irregularity and laxity of the pleadings, if, indeed, the informal minutes upon the record be entitled, in any measure, to the appellation of pleadings. Some apology is, indeed, to be found in the asserted inaccurate local practice in the State courts; but it is impossible, without breaking down the best-settled principles of law, not to perceive that the very errors in the pleadings are, of themselves, sufficient to justify a reversal of the judgment and an award of a repleader. The agreement of the parties, filed in the case, may, indeed, help the formal defects, but can not be admitted to dispense with the substance of appropriate pleas; for, otherwise, it would be difficult to ascertain what was tried, or to be tried; and we might as well dispense with the declaration, as with the subsequent pleadings.

When, therefore, the case was referred, there was no suit. The practice, under the circumstances, is well settled and laid down by all text writers. The cases are numerous and appear to be all one way.

Williams et al. v. *Powell* (9 Porter (Ala.), 493) was an action of debt. The errors relied on in the Supreme

Court were: First, that there was no declaration; and second, if there was a declaration, it was insufficient to sustain the judgment. It appeared that the declaration in the case had been lost or mislaid, and after judgment rendered the court had allowed a declaration to be filed as a substitute.

The court stated the practice, as follows:

> We are aware that if, on motions to substitute papers, affidavits and counter affidavits are received to aid the determination of the court, questions of fact exceedingly embarrassing would arise, so much so that it would be difficult, if not impossible, in many instances, to attain a satisfactory conclusion. To avoid this perplexity, the court should, in the first place, propose to the parties to permit such a paper to be filed as they may agree on. If they will not, or can not agree, then the court should have recourse to such proof as may satisfy it that the paper offered corresponded so nearly with the paper lost that the adverse party could not be prejudiced; but in no case should a substitute be allowed where this proof can not be made.

Glover v. *Rainey* (2 Ala., 727) was a bill in chancery, where the bill had been lost or abstracted from the files, and a motion was made by the defendant that the case be dismissed for want of prosecution, which motion the court refused, and at a subsequent term of the court decreed that a report which had been made in the cause "be confirmed; that defendant pay to complainant the sums ascertained against him, for which he may have execution; and that the

receiver pay over to complainant the sum reported to be in his hands, and that defendant pay the costs of this suit."

The defendant prosecuted a writ of error.

The court said:

> In *Dozier* v. *Joyce* (8 Porter, 303) and in *Williams* v. *Powell* (9 Porter, 493) this court laid down the rules for the substitution of lost papers from the files, and that this right existed as well after as before judgment; and could be done pending a writ of error. In this case the bill is lost, or has been abstracted from the file of papers in the cause, and no attempt has been made or offer to supply its place; indeed, the counsel for the defendant in error admits his inability to do so.
>
> In this aspect of the case it is impossible to sustain the decree; without the bill it is impossible to know, with any approach to certainty, what the nature of the claim asserted against the defendant is; and without knowledge on this head how can it be ascertained whether the report of the master, made as it must have been, if correctly made, on proof of the allegations of the bill, is correct or not? It is true it may be conjectured what the allegations were from the answer and other facts of the cause; but any decision based on such data would be deficient in that certainty which is necessary in all judicial proceedings.
>
> The decree is therefore reversed and the bill dismissed. (2 Alabama, 727.)

In *Groch et al.* v. *Stenger* (65 Illinois, 481, 483) the court said:

> Aside from this view of the case there is a fatal error in the record. The supplemental bill upon which the decree is based does not appear in the record. It is represented that it was missing from the files at the date of the decree, which seems to be conceded by the counsel for defendant in error. If so, the court ought to have caused the files to be supplied before it pronounced its decree. It was error not to do so.
>
> For the error indicated the decree is reversed and the cause remanded for further proceedings.

Instead of supplying or attempting to supply the petition, the claimant filed what he called an amended petition. This is in no sense an amended petition. An amendment is the correction of an error committed in any process, pleading, or proceeding at law or equity. An amendment can be allowed only where there is something in the record to amend by. (1 Ency., Pl. and Pr., 462.)

In *Johnson* v. *Mayrant* (1 MCord (S. C., 484), which was an action of debt on a judgment, a motion was made by counsel for the plaintiff for leave to amend generally, which was granted.

The defendant appealed and moved to rescind the order, on the grounds—

> First. Because a general order, giving leave to amend, would not authorize the substitution of an entire new declaration, with a different plaintiff, and that the order for filing the amended

declaration in this case is against law and practice on the subject of amendments.

Second. Because the declaration ordered to be filed is no amendment of the original one.

The court said:

I take it to be a well-established principle that in every case where an amendment is desired there must be something to amend by, or the case can not be cured but by a new action. Sellon, vol. 2, 456, after enumerating various amendments which may take the place in every stage of a suit, adds these words: "It is necessary, however, that in all such cases there should be something to amend by, as the *præcipe* to amend the writ, the paper book to amend the roll, the judge's notes to amend the verdict, etc., by which it may appear that the variance is a mistake, and therefore in strict justice ought to be rectified." And a distinction is taken between amending those mistakes which are occasioned by the act of the party and those which are occasioned by the act of the clerk. The party plaintiff in this case has brought an action as assignee of a judgment obtained in favor of David Alexander, when, in fact, the judgment had never been assigned, and the amendment required is, that the name of a new plaintiff is to be substituted in the declaration in lieu of the one commencing the action. There is nothing in the writ which can possibly justify such an application. There is no clerical mistake here requiring amendment that justice may be done; but the object to be attained is the shifting the burthen of a suit from the shoulders of Johnson, who

had no right to institute it, upon those of David Alexander and who, for all we know, may have been satisfied for this debt, or unwilling to sue the defendant upon the judgment. Suppose David Alexander were now present and should declare his unwillingness to be made a party to this suit, could this court force him into the action, *nolens volens?* I think not, as the declaration allowed to be filed in this case would constitute, to all intents and purposes, an entirely new and distinct suit; by making a different plaintiff it can not be considered in the light of an amendment. If this judgment has not been assigned to Johnson, the defect in bringing this action can never be cured; it vitiates the proceedings *in toto* and renders them null and void.

In *Newman* v. *Dodson* (61 Texas, 91, 99), the court said:

> As to the point made by appellee upon his cross appeal, it is sufficient to say that we hardly think it was the contemplation of our present rules that a lost pleading might be supplied by a mere amendment. These rules require that all amendments, with the exception of trial amendments, shall be substituted for some previous pleading. To determine whether or not it is such substitute it is necessary that the court should have access to the former pleading. Moreover, if pleadings can be supplied by mere amendment, without affidavit or certificate as to the lost paper, the statute on that subject will be in effect a nullity. What was done in this case amounted to a substitution,

> without any proof that the new petitions were in substance the same as the former, with something added which was before left out; and it is not the theory of the law upon this subject that the mere statements of the pleader shall serve in place of what the statute requires to be put in under the sanctity of an oath. If so, he may under the guise of an amendment state any allegations he may choose, and thus bring into court a new paper unauthorized by the one which was destroyed.

Nor was this amendment to correct a mere irregularity or formal defect. It was the introduction and commencement of an entirely new suit. When the new paper was presented there was nothing to show the court what the case was. There was no reason given, no explanation made, why the original suit was sought to be abandoned and a new one substituted. The objection went to the very pith and marrow of the proceeding.

II.

The defendant might have rested here. It did not. Satisfied the claimant had no just demand against it, the District, unable to furnish the missing petition and the report of the former referee, attempted to show, first to the referee and afterwards to the court, what the causes of action were in the original petition.

Dan. Donovan had been the referee to whom was referred case No. 335, *Stephen Talty* v. *The District of Columbia*. The report was lost. Donovan was dead. But during his lifetime he made, by direction of the

Attorney-General, a statement in which was included an abstract of the report he had made as referee. This is as follows (Rec., p. 14, 19):

> This case involved the examination and stating of accounts under seven separate and distinct contracts. It was referred to me as referee by the Court of Claims, and was reported under a rule of said court. * * *
>
> | | |
> |---|---|
> | Said report shows that claimant is entitled to recover from the defendant under his several contracts the sum of | $1,814.79 |
> | It further shows that claimant is indebted to defendant, by reason of overpayment by the board of audit, in the amount of | 989.71 |
> | Thus leaving net balance due claimant | 825.08 |
>
> Attached to said report and forming part thereof is the following set-off:
>
> | | |
> |---|---|
> | File No. 22, 61.5 square yards of cobblestone pavement relaid, allowed at 37 cents per yard in lieu of 30 cents, the contract rate. Excess 7 cents per yard on 61.5 yards | $4.30 |
> | 8,237.98 cubic yards grading, allowed at 40 cents per yard in lieu of 30 cents, the contract rate. Excess 10 cents per yard on 8,237.98 yards | 823.79 |
> | 784.20 cubic yards rock excavation, allowed at $1 per yard in lieu of 30 cents per yard, the contract rate. Excess 70 cents per yard on 784.20 yards | 548.94 |
> | Total | 1,377.03 |
>
> A more thorough and exhaustive examination of the records which constitute my former report in this case convinces me that the counterclaim

therein reported is both erroneous and unjust, for the reason that M street northwest, wherein the alleged excessive allowances were made claimant, was in fact, at the time he did the work, an old graveled street, and also that rock was encountered in part of it. It also appears that nearly the whole of the work was done under the Commissioners of the District of Columbia, and that the prices certified by the engineer and paid Talty were what are commonly known as "board rates," and that said allowances were not made under any mistake of fact, but that they were the prices universally paid to other contractors doing similar work at the time.

I am therefore of the opinion that my former report should be amended by striking out the set-off therein stated, and finding a balance due Talty of $825.08, with interest from March 1, 1876. All of which is respectfully submitted.

DAN DONOVAN.

A supplemental report of Mr. Hackett, containing the offer of this testimony, is not in the transcript, but the paper is set out twice, as we have seen. And the fifth exception to the report of the referee is that the referee erred in rejecting this evidence. (Rec., p. 12.)

The referee and the court rejected this evidence and refused to consider it for any purpose at any and every stage of the proceedings; and these refusals are assigned for error.

Primarily, this paper was evidence to show that the original suit was brought upon seven contracts. Had

Donovan been alive and the claimant had offered to prove by him and by his report the character of the original suit, could he not have done so? Donovan being dead, had the claimant offered his report in evidence to show the suit was brought upon seven contracts, would it not have been received? Were it shown that report also was lost, would not an abstract of it, under the signature and in the handwriting of the referee, have been competent secondary evidence? And if the claimant could use this evidence for purposes of substitution of the petition, could not, by much stronger reason, the defendant have it considered to show the nature of the original suit and the variance between it and the one offered to be tried?

What manner of report is it the referee makes in cases under this act of 1880? All these suits were based upon accounts for work and labor done and expended under contracts. The manner in which the Court of Claims has tried cases between the claimants, who were contractors, and the District is fully explained in *Neitzey* v. *The District of Columbia* (17 Ct. Cls. R., 111, 122–126). Neitzey brought suit to recover, on a certain contract, $269.34. The defendant pleaded a set-off, arising from overpayments made under another contract. Various reasons were assigned against the consideration of the set-off. The court, by Mr. Justice (now Chief Justice) Nott, said:

> It must be conceded by all parties, it can not be doubted by any rational mind, that the general purpose of Congress was to do justice

> between these parties. It can not be supposed that Congress intended to throw down technicalities which stood in the way of the claimant and leave them standing in the way of the defendant. The legislative intent could not have been that a contractor might pick out one of a dozen distinct transactions and bring it into court and recover a judgment upon it if he were really indebted to the District in the other eleven.

And so on the learned judge proceeds in well-considered remarks upon the statute. His views may be emphasized by reference to the provision in the *second* section:

> When the validity of a number of claims depends substantially upon a like state of facts, they may be brought before the court in one petition in which all parties are joined, and may be tried together under such rules as the court may prescribe, and such judgments may be entered therein as the court may determine; and cases of like kind may be consolidated and tried together whenever the court so orders.

By section 1 it is provided:

> When the trial of any claim against the District of Columbia, prosecuted under the provisions of this act, involves the taking and stating of a long account, * * * said court shall have power to award a reference to a competent referee to take and state such account, etc.

Talty brought his suit upon seven claims. The case was referred to a referee. Was not this statement of

the referee evidence to prove the facts that the suit was brought on seven contracts and that a set-off was filed?

In *Nicholls* v. *Webb* (8 Wheat., 325, 337), after a careful statement of the nature of secondary evidence and its force under varying circumstances, and a review of some pertinent authorities, Mr. Justice Story, delivering the opinion of the court, said:

> We think it a safe principle that memoranda made by a person in the ordinary course of his business of acts or matters which his duty in such business requires him to do for others, in case of his death are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence, and to be encountered by any presumptions or facts which diminish its credibility or certainty. *A fortiori*, we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer and is clothed with public authority and confidence.

See also *Insurance Co.* v. *Weide*, 9 Wall., 677; *Insurance Co.* v. *Weides*, 14 Wall., 375; *Chaffee* v. *United States*, 18 Wall., 516; *Turnbull* v. *Payson*, 95 U. S., 421; *Bank of United States* v. *Davis*, 4 Cr. C. C., 533; *Kello* v. *Maget*, 1 Dev. & B., 414; *Dobson* v. *Murphy*, ib., 586, 590; *Kellogg* v. *Resse*, 1 N. Y. Sup., 291; *Turner* v. *Yates*, 16 How., 14; *Allen* v. *Killinger*, 8 Wall., 480; *Newburyport* v. *Waltham*, 150 Mass., 311; *Waltham* v. *Newburyport*, ib., 569.

This report of Donovan's was of a *quasi* official

character anyhow. It was made by him under a double oath. It was a statement of what his official report contained; and he was dead at the time of the offer. When this was offered by the defendant, for the purpose of showing that the case acted upon by the referee, made the subject of his report, which was confirmed and adopted by the Court of Claims, was not the case brought by Talty in December, 1880, it was error to treat the amended petition as a substitute and to attempt to make an account thereunder which would bind the District of Columbia.

III.

But even then, with all these imperfections upon its head, the report of Mr. Hackett did not state an account. His first report was objected to and a motion for rereference made. This practice was sanctioned in *The Ship Potomac* (2 Bl., 581). The rereference was ordered. A new report was made. To this report the defendant filed his exceptions, which were based again upon the failure by the referee to state an account. It was contended by the defendant that no account would be proper unless made under the original case. Defendant, claimant failing or refusing, made what it claimed was a *prima facie* showing to guide the referee as to what was necessary for him to state in the account. It was impossible for the officer to do this. The act of 1880 provides (sec. 2, 21 St. L., 285) "That all certificates, measurements, or other evidence of indebtedness in the custody of the Commissioners of the District of Columbia shall be deposited with the

Court of Claims upon the application of any claimant." Upon these official papers were based the claims of the contractors for recovery. These measurements, with the prices allowed for the work carried out by the District officers, and indorsements of the certificates or warrants which had been delivered in part payment, formed the basis of all demands. They were not final, but could be shown to be erroneous by either the contractor or the District. Where, as was frequently the case, overpayments had been made, the District filed set-offs or counterclaims. The court entertained these, and, when they were sustained, charged the contractors with the amounts paid in excess of the rates specified in the contracts, and gave judgment upon the whole case either for or against the District, as the balances showed. (*Brown* v. *District of Columbia*, 17 C. Cls. R., 402; *Campbell & Eslin* v. *District of Columbia*, 18 ib., 193; *Roche* v. *District of Columbia*, 18 ib., 257; *Barnard* v. *District of Columbia*, 20 ib., 257; *Barnes* v. *District of Columbia*, 20 ib., 366.)

But in this case all these papers were lost. Not one could be found. The referee should have reported his inability to state an account. He was not required to make bricks without straw.

He did not take this course. He accepted the amended petition. He refused to receive any evidence outside of that. The amended petition counts upon but one contract, No. 826. And even then the referee did not state the account under that contract. He himself says he could only state a balance taken from a report of a district officer. This is secondary testi-

mony, liable to exactly the same objection which the referee and the court made to the report of Donovan. That it is inferior to the latter is not because of its quality as evidence, but because of its inadequateness. It is not an account at all. *Cushing* v. *Nantasket Beach R. R.*, 143 Mass., 77. It is perfectly apparent that it was impossible to make an account, or to make a statement which would enable a court to arrive at a correct conclusion as to the merits of this controversy.

The duties of the referee are the same as those of a master in chancery deputed to take and state an account under the old practice in equity, with the significant addition that the referee must report the evidence for the information of the court. The reference is limited and interlocutory.

The Court of Claims has promulgated no rules governing procedure before and by referees. Unless, therefore, special instructions are given them, they exercise the functions of masters in chancery under the old system. Under a similar statute—the New York code—a reference may be ordered where the taking of an account shall be necessary for the information of the court before judgment or for carrying a judgment or order into effect. Mr. Hoffman says:

> This provision answers to the decretal order of the chancery system. Generally the court, having settled the point that the party was entitled to an account, referred it to a master to take and state the same. (Hoffman on Referees, 83, 84; *Ketcham* v. *Clark*, 22 Barb. Sup. Ct. R., 319; 2 Daniell's Ch. Pl. and Pr., 1168 et seq.)

Although no statute authorizes directly the prescript of practice in the matter of these references in the Court of Claims, that court will resort to the practice established by the Supreme Court for the courts of equity of the United States, because of its just analogies and its universality.

In *Ransom* v. *Davis's Administrator* (18 How., U. S., 295), where an account was referred to an auditor, this court said:

> Where a chancery suit involves matters of account the action of a master should be had in the inferior court, and the items admitted or rejected should be stated, so that exceptions may be taken to the particular item or class of items, and such a case should be brought before this court on the rulings of the exceptions by the circuit court.
>
> (See also *Gage* v. *Arndt*, 121 Ill., 491; *Nims* v. *Nims*, 20 Fla., 204.)

Nothing is stated of the account under the original contract except the amount due. The defendant endeavored in every way to compel such a statement as would afford the court the means of judging whether it was correct. The report was sent back to the referee. The additional report, as far as contract No. 826 is concerned, is no different or better than the first one. The defendant excepted, and his exceptions were overruled and the report confirmed. But the abstract of Donovan's report showed there was a counterclaim or set-off for overpayments under this very contract 826. This counterclaim was because the contractor had been

allowed the board rates instead of the contract rates in the settlement embodied in the Hackett report. And, although Donovan states that he was of opinion these board rates ought to be allowed, it has been decided, both in the Court of Claims and this court, the contract prices must govern. (*Barnard* v. *District of Columbia*, 20 C. Cl. R., 257; S. C., 127 U. S., and numerous cases.) Mr. Hackett refused to consider this counter-claim.

IV.

In connection with these objections to the substitution of the petition and the manner of stating an account, which are shown by the exceptions to the referee's report and again in the requests for findings of fact, must be taken the conduct of the claimant in prosecuting this suit. The original suit was filed on the 15th day of December, 1880. Some sixteen and a half years afterwards the case was referred to Mr. Hackett. After that reference, on the 2d day of July, 1897, was filed the paper upon which Mr. Hackett bases his account under contract No. 826 and the other paper upon which he bases his account under extensions of contract 826 (Rec., pp. 6, 8). After this, on the 28th of July, 1897, was filed this amended petition. Meanwhile, all the papers in the original case had been lost. Contract 826 and extensions were included in the original case.

These papers filed with Mr. Hackett were not before the first referee. Why? Because there was better evidence. The latter referee discloses the character of

the paper upon which he based his account under the extensions. It is an original sheet of measurements; it contains "a memorandum attached to the first of such sheets" of the computing engineer; it is "a copy from the account of Stephen Talty with the District; contains an item of property charged against the contractor, written in lead pencil." It was not deemed essential to be presented at the first reference, because it was partial, incomplete, unconnected, fragmentary. Mr. Hackett says that, "in these circumstances (that is, the loss of all the papers), the referee is satisfied to rely upon the memoranda in the sheets just referred to."

Now, why this delay in the prosecution of the suit? If uncertainty arises as a fact, and clouds and dims accuracy in the result, who is to be responsible? Conceding it is not necessary to assert this was an abandonment of the claim, in the condition of these parties, is not such laches apparent as will prevent a recovery? The principle of laches, as applied in the commencement of suits in courts of equity, has force in the further prosecution of suits in the courts of both law and equity. Compliance with a statute of limitations does not excuse subsequent notorious negligence. Courts, in their practice, provide rules to expedite proceedings, and enforce obedience to them generally. If, by reason of oversight or the indifference and inattention of a suitor a case is left alone until the pleadings are lost, the witnesses dead, the evidence destroyed, the result uncertain to be arrived at, courts can not step in and give him relief upon inference or conjecture. In

this regard the analogies of the doctrine of laches afford a safe rule. It was said in *Speidell* v. *Henrici et al.* (15 Fed. Rep., 753, 756), "A suitor in equity is required to be 'prompt, eager, and ready' in the pursuit of his rights. Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged." So, every suitor, when in court, must be prompt, eager, and ready in the pursuit of his rights, observant of the means afforded to him for speedy determination of his cause; and if by his supineness he loses the instruments necessary for success he can not hope to have the assistance or indulgence of the courts.

In *Brown* v. *County of Buena Vista* (95 U. S., 157, 161), the court said "The law of laches, like the principle of the limitation of action, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded." (*Godden* v. *Kimmell*, 99 U. S., 201; *Etting* v. *Marx's Ex.*, 4 Fed. R., 673; *United States* v. *Beebe*, 17 id., 36; *Kittle* v. *Hall*, 29 id., 508; *Tazewell's Exr.* v. *Saunders, Exr.*, 13 Gratt. (Va.), 354, 362; *Nelson* v. *Carrington*, 4 Munf. (Va.), 332.)

In *Harrison et al.* v. *Gibson* (23 Gratt., 212), the court said:

> The cases do not fix any period as limiting the demand for an account. If, from the delay which has taken place, it is manifest that no

> correct account can be rendered, that any conclusion to which the court can arrive must at best be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim.

By the rules of the Court of Claims it is contemplated the claimant shall close his proofs within two years after filing his petition. (Rule 74.) By the practice, cases do not come before the court until placed by one party or the other on the calendar. In this case at bar all the proofs were closed by both parties before the 19th day of May, 1885, the date of Donovan's report. Immediately thereafter the claimant stopped.

But by the seventh section of the act of 1880 it was provided: "In all cases prosecuted under the provisions of this act it shall be the duty of the claimant, after the commencement of said actions, to prosecute them in said court diligently; and after any issue of law or of fact shall be joined in any case, the Attorney-General shall have power to place the same on the trial calendar of said court for trial, etc." This legislation is the assertion of the principles underlying limitations at law and laches in equity.

The case was not prosecuted diligently. It was not *pursued* at all. It was virtually abandoned. For, while

it lay moribund, on February 13, 1895, Congress passed an act (c. 87, 28 St. L., 664) providing that the Court of Claims should allow the rates established and paid by the board of public works, and whenever said rates had not been allowed, the claimant or his personal representative should be entitled, on motion made within sixty days after the passage of the act, to a new trial of such cause.

This act was repealed March 3, 1897 (c. —, 29 St. L., 669).

It is apparent by the course of the claimant himself, even up to the time of the filing of this *amended* petition, that the only matters in dispute were the correctness of the accounts, *as furnished by the officers of the Government.* The only question of difference would have to be as to the allowance of *board rates* as different from *contract rates* for work done. During the life of the statute of 1895 this difference was wiped out. And yet, during those two years, not one step was taken. Does this not show an actual abandonment of the suit? If he had a claim of any kind whatsoever the doors were wide open for him to establish it. Without yielding this point it is not imperative upon the defendant to insist upon it. It is sufficient for its contention that, under these extraordinary circumstances, claimant had acquiesced in the impossibility of stating an account which would show he had a valid claim against the District.

V.

It was necessary to take steps to vacate the judgment in order that the defendant might present formal requests for findings of fact. Strictly, perhaps, under the decisions of this court, the refusal of the motion for a new trial is not subject to review.

But, at the same time, the defendant made certain requests for findings of fact, which were considered by the court and refused generally. To this refusal defendant filed specific exceptions, upon which the court made a ruling overruling them and stating the reasons for refusing the requests. (These rulings are signed "By the Court.")

The second, third, fourth, and sixth requests were refused on the ground that "the same refer to matters of record in the case and not to facts established by evidence."

It is frequently difficult, under the practice in some jurisdictions, to frame requests for findings of facts which will require a statement of the conclusions of law deemed essential. It is difficult often to avoid framing a request which will not involve a mixed question of law and fact. The separating line between what is evidence and what is deduced from evidence is ofttimes hard to trace. If every fact which is not an ultimate fact were excluded there would be nothing to review. And yet the statement of facts in a special verdict, or in the findings of fact, must be such as to enable a court of errors to act upon it. Consequently,

these findings may be, of necessity, sometimes of circumstantial facts.

The inspection of this record shows in an eminent degree the difficulties which beset the pleader. The defendant claimed there was no petition in the case. The answer was, The amended petition. The reply, This is not an amendment. Proof was introduced to show that the original petition was brought for an account upon seven contracts. The court was requested to find that as a fact. They refused to say whether it was so or not. Suppose this was a circumstantial fact; was it not one of those facts necessary to be known to make a conclusion of law upon a disputed question? Because, if affirmed, it is as clear as truth itself, from the findings as recorded, that judgment for claimant could not go, for want of proof. If denied, it would have to be because there was no evidence one way or the other. Then there could be no recovery; there would be nothing upon which to hang a verdict and judgment.

But the court refused the request on the ground it was matter of record and not evidence. If it was matter of record, it was only by virtue of the petition, which would have to be in the transcript, by the rules of this court. It is certified that this can not be, the petition having been lost. How, then, is it matter of record? If it should be, must not all proceedings be stopped until it is supplied?

Why is not what is asked in the request as much evidence as what is contained in the actual findings

of the court? The court finds that the parties entered into contract No. 826. An amended petition declares upon contract 826. Why is it not susceptible of proof that the parties entered into seven contracts; that the original petition was for an account upon these contracts? The account upon contract 826 is (imperfectly) stated in the findings. Why is it not competent to find that an account was ordered and stated, *in this case*, upon seven contracts? The balance only is shown under contract 826. Why was it not competent to ask a finding what was the balance in the original case?

The special verdict in the Court of Claims does not in the practice, like the special verdict at common law, find all the facts in one connected form. The facts are found in paragraphs. They ought to be stated in sequence, so that, in review, they may be taken together and passed upon as to their correlation in reference to the ultimate fact to be found. And this was the effort in framing the prayer of the defendant. The infirmities of pleading and evidence attach to the claimant, and must be borne by him. The facts which the defendant asked to be found, if found as he asked them, irresistibly compel another and different judgment. They may be circumstantial; but they are of the character commented upon and elucidated by Mr. Chief Justice Waite, delivering the opinion of this court, in the determination of these very questions. In *United States* v. *Pugh* (99 U. S., 265, 269) he said:

> The second question presents for consideration a subject of much importance connected with

the practice under our rule, in reference to appeals from the Court of Claims, which requires "a finding" by that court "of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them." The ultimate fact to be determined in this case is whether the proceeds of the sale of the captured property belonging to the claimant have been paid into the Treasury. No direct proof to that effect has been given, but if shown at all, it is by way of inference from certain circumstantial facts which have been established by the evidence. These circumstantial facts are set forth in the finding which has been sent here as the finding upon which alone the judgment was rendered, and as the case stands the question we are to decide is whether those facts are sufficient to support the judgment. Confessedly, the court has found all the facts which have been directly established by the evidence These facts are not evidence in the sense that evidence means the statements of witnesses or documents produced in court for inspection. They are the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. If what has been found is, in the absence of anything to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the Treasury, the judgment is right. Otherwise, it is wrong. The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make

the proof; and the question of practice to be settled is whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in a case is final and conclusive, or whether it may be brought here for review on appeal.

From what is said in *Ross's Case* (12 Ct. Cls. R., 565) and by the reporters in a note (11 id., 344), we are led to suppose that the Court of Claims understands that our decisions in *United States* v. *Ross* (92 U. S., 281) and *Intermingled Cotton Cases* (id., 651) leave this question somewhat in doubt. To avoid misapprehension in the future we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on the appeal to decide upon the weight of evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped and their legal effect as a whole determined. If the case could come

here in such a form as to require us to consider the evidence, we should be required to trace the evidence to its logical results, find in this way all the facts that had been proven, and then declare the final legal conclusion. The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal. The position which the case occupies when it comes here under such circumstances is precisely the same as it would be if the facts, instead of being found by the court, had been agreed upon by the parties and their agreement embodied in the record.

In *United States* v. *Crusell* (14 Wall., 1) the question was whether the particular facts found justified the conclusion that the money sued for had been paid into the Treasury; and inasmuch as the legal presumption is, in the absence of anything to the contrary, that the officers of the Government perform their duties when called upon to act in their official capacities, we thought that the law would infer from the facts found that the money which ought to have been paid over by a quartermaster to his superior officer was actually paid over, and that in this way it had reached the Treasury. So in

Intermingled Cotton cases (*supra*), when it was found that the cotton of the several claimants contributed to and formed part of the captured mass from which the cotton sold was taken, we concluded that the claimants were entitled to their respective shares of the money in the Treasury as the proceeds of the sale. In *United States* v. *Ross* (*supra*), however, we thought a similar conclusion from the particular facts there found was too remote, and so reversed the judgment and sent the cause back for a new trial. The premises we considered too uncertain to justify the inference that had been drawn. We thought independent and material facts were wanting, and that the law would not raise the presumption from what did appear that the plaintiff was entitled to recover. The difficulty in that case was not as to the power of this court to act upon the facts as found, but as to the sufficiency of the facts to support the judgment.

The requests refused may include mixed questions of law and fact. This can not be objectionable. The court unpersuadably declined to make conclusions of law. There are none in the record. There is, upon the meager facts found, only a judgment.

By the seventh section of "An act to provide for the bringing of suits against the Government of the United States" (c. 359, 24 St. L., 505) it is provided: "That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the con-

clusions of the court upon all questions of law involved in the case," etc.

It is not material whether this section is binding upon the Court of Claims or confined to the circuit and district courts. I have no doubt as to its interpretation. It is general and applicable to all courts having jurisdiction of the subject-matter of the act—not confined, as in sections 5, 6, 10, etc. But, while a little more definite in its description, it is really the same in its requirements as paragraph 2 of rule 1 of the regulations prescribed by the Supreme Court, under which appeals may be taken from the Court of Claims. That rule requires a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment. The failure of the Court of Claims to do this is assigned as error.

To conclude: The uncertain and unsatisfactory character of the conclusions of the court below must be acknowledged. As Mr. Justice Story said, it is impossible, without breaking down the best-settled principles of law, not to perceive that the very errors in the pleadings are, of themselves, sufficient to justify a reversal of the judgment and an award of a repleader.

The issues made required the settlement of the accounts between this claimant and the District of Columbia. That this was not done is certain. The whole case shows that the conclusions arrived at were at best conjectural, because of the loss of evidence. "If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court

will not interfere, whatever may have been the original justice of the claim."

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FILED
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JAMES H. McKENNEY,
Clerk

No. 238.

Add'l Brf. of Atty. General (Rawlett)
for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 17, 1901.

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
STEPHEN TALTY. } No. 238.

ADDITIONAL MEMORANDUM OF POINTS AND AUTHORITIES BY APPELLANT.

The appellant desires to notice what is said by appellee on pages 8 and 12 of his brief that the appeal was not taken within ninety days from the rendition of the judgment and that the judgment was rendered on the 26th of February, 1899, and not 1900.

The transcript is wrong, as is the original record on file in the clerk's office of the Supreme Court. I have applied to the Court of Claims for a correction in the record sent to this court and respectfully ask permission to file the same.

I also beg leave to file the following additional authorities on the question of the authority to hear the cause upon the "amended petition."

> SEC. 954. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or

reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

In *Randolph* v. *Barrett* (16 Pet., 138) this court said:

> To reverse this judgment the counsel for the plaintiff in error relied on these grounds: 1. The circuit court had no authority to order the amendment of the summons and declaration, there being nothing in the record to amend by. 2. No judgment could be rendered against the defendant until the plea in abatement was disposed of. 3. Judgment by default could not be taken against the defendant after appearance entered.
>
> The power of the court to authorize amendments where there is anything on the record to amend by is undoubted. In this case the defendant admitted by his plea that he was the person liable to the suit of the plaintiff, but he averred that he was executor and not administrator. Whether he acted in one character or the other, he held the assets of the testator or

intestate in trust for the creditors, and when his plea was filed it became a part of the record and furnished matter by which the pleadings might be amended. (*Master* v. *Hurtz*, 3 Maule and Selw., 450.)

Barnes' Notes 5: 1 Mass. 433. And in addition to these authorities, express authority is given, by the thirty-second section of the judiciary act of 1789, to the courts of the United States, to permit either of the parties, at any time, to amend any defect in the process or pleadings, upon such conditions as the courts shall, in their discretion and by their rules, prescribe. This amendment is, therefore, not only authorized by the ordinary rules of amendment, but by the statute also.

In *Woodruff* v. *Dickie* (31 Howard Pr. R., 164–167), the court said:

> An amendment is the correction of some error or mistake in a pleading already before the court, and there must be something to amend by, whereas the insertion of facts constituting a new cause of action or defense would be a substituted pleading, and not an amendment of an existing pleading.

And so in *Wilson* v. *Wallace's* Ex. (8 Serg. and R. 53–56) the court said:

> This power (of amendment), extensive as it is, does not, under the name of amendment, authorize an alteration or change of the cause of action, though it does every defective statement of it.

24. A claimant desiring to amend his petition or to introduce new parties may do so at any time before final submission, without special leave, by filing an amended petition embodying the amendments desired. The right to make such amendments, or to introduce new parties, is subject to the objection of the defendants either before or at the trial.

I ask leave to file herewith a certificate from the Court of Claims showing the motion for allowance of appeal, in response to writ of certiorari.

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L. A. PRADT,
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